

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANGUS COOPER	:	DETERMINATION
	:	DTA NO. 819149
for Revision of a Determination or for Refund of Sales	:	
Use Taxes under Articles 28 and 29 of the Tax Law for	:	
the period June 1, 1986 through August 31, 1993.	:	

Petitioner, Angus Cooper, 60 Seaman Avenue, Apartment 1-H, New York, New York 10034, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1986 through August 31, 1993.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 12, 2003 at 10:30 A.M. with all briefs to be submitted by September 12, 2003, which date commenced the six-month period for issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Michael F. McKinley, Esq., of counsel).

ISSUE

Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of 507 Columbus Avenue Restaurant, Corp. and Cooper's Café, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) and is, therefore, personally liable for payment of the taxes, penalties and interest due from the corporations.

FINDINGS OF FACT

1. On August 2, 1993, the Division of Taxation (“Division”) issued four notices of estimated determination to petitioner as an officer of Cooper Café, Inc. (“Cooper Café”) as follows ¹:

Notice Number	Period Ended	Tax	Interest	Penalty	Payments/ Credits	Balance Due
L-007721132	08/31/86	\$2,326.50	\$2,975.69	\$697.85	\$0.00	\$6,000.04
L-007721131	11/30/86	2,326.50	2,819.43	697.85	0.00	5,843.78
L-007721130	02/28/87	2,326.50	2,669.43	697.85	0.00	5,693.78
L-007721129	05/31/87	2,326.50	2,520.60	697.85	0.00	5,544.95

2. The amount of tax asserted to be due in each of the notices was estimated because Cooper Café did not file sales and use tax returns for the periods assessed in the notices. On August 7, 2001, Mr. Cooper filed returns on behalf of Cooper Café, which were signed by him as president, and reported that there were no sales during the four periods that were assessed. As a result, the Division eliminated the assessments of tax and reduced the penalty imposed for each period to \$50.00 for failure to file a return. At the hearing, Mr. Cooper acknowledged that he was responsible for the taxes due from Cooper Café.

3. On November 1, 1993, the Division of Taxation issued nine notices of determination to petitioner, Angus Cooper, which assessed a deficiency of sales and use taxes as a responsible

¹ The Division did not introduce copies of the notices of determination. Rather, it introduced a microfiche copy of each notice and an affidavit of a Division employee explaining the Division's practices and procedures regarding the retaining of microfiche copies rather than hard copies of notices. The evidence submitted is sufficient to establish that notices were issued, especially since no question has been raised in these proceedings as to whether the notices were issued. (*See, Matter of Huang*, Tax Appeals Tribunal, April 27, 1995.)

officer of 507 Columbus Avenue Restaurant, Corp. (“Columbus Avenue Restaurant”) as follows ²:

Notice Number	Period Ended	Tax	Interest	Penalty	Payments/ Credits	Balance Due
L-008150266	08/31/90	\$13,488.78	\$6,112.70	\$4,046.47	\$0.00	\$23,647.95
L-008150264	02/28/91	15,897.49	5,869.86	4,769.14	0.00	26,536.49
L-008150263	05/31/91	13,970.53	4,588.53	4,191.05	0.00	22,750.11
L-008150262	08/31/91	16,823.90	4,859.93	5,046.99	0.00	26,730.82
L-008150261	11/30/91	18,592.28	4,664.58	5,577.62	0.00	28,834.48
L-008150260	02/28/92	15,386.86	3,299.30	4,462.02	0.00	23,148.18
L-008150259	05/31/92	23,044.31	4,107.58	5,991.47	0.00	33,143.36
L-008150257	11/30/92	15,090.74	1,651.83	3,018.07	0.00	19,760.64
L-008150254	08/31/93	10,819.02	150.40	1,190.09	0.00	12,159.51

4. In or about November or December 1989, Mr. Cooper was approached by a group of people who asked him to manage a restaurant which became the Columbus Avenue Restaurant. He was selected for this task because he had prior experience in operating restaurants.³ Mr. Cooper was told that he would not have to make an investment in the restaurant and that, if it was successful, he would be compensated. Consequently, he worked on establishing the restaurant but did not invest funds in the business. The promoters of the restaurant were willing to give Mr. Cooper this opportunity because he knew many people in the area. They also thought that he would have an easier time obtaining a license to operate a restaurant because he

² Again, the Division did not introduce copies of the notices of determination. Rather, it introduced a microfiche copy of each notice and an affidavit of a Division employee explaining the Division's practices and procedures regarding the retaining of microfiche copies rather than hard copies of notices.

³ Mr. Cooper had previous experience at Cooper's Café, in which he owned the outstanding stock, and at Tavern on the Green, in which he was the manager.

had previously obtained other licenses. Subsequently, Mr. Cooper applied for the license and opened up the restaurant. Petitioner had the title of president of the corporation. He was also described as a shareholder and director in documents filed with the New York City Alcoholic Beverage Control Board.

5. As part of the process of establishing the restaurant, Mr. Cooper interviewed and hired employees of the business.

6. Once the restaurant began operating, Mr. Cooper's time was consumed meeting and seating patrons. He also supervised the individual who ordered food for the kitchen. Mr. Cooper had the authority to sign checks, but two signatures were required. At some juncture, he stopped signing checks. His duties did not include paying creditors of the business.

7. The Columbus Avenue Restaurant maintained records of its sales and purchases. Although Mr. Cooper could have looked at the records, he did not do so because he did not regard it as his responsibility. It was Mr. Cooper's understanding that his function was to obtain a license and advise people on how to set up the business.

8. As president, petitioner exercised authority with respect to tax matters. On behalf of the Columbus Avenue Restaurant, he signed the Certificate of Registration for sales tax, which was dated February 9, 1990. He also signed a series of sales and use tax returns and New York State withholding tax documents dated January 31, 1990 and January 30, 1992. Mr. Cooper did not have any role in preparing the sales tax returns and merely signed the returns which were handed to him. At one juncture, Mr. Cooper told the accountant for the Columbus Avenue Restaurant to make sure that all of the sales were accounted for. Petitioner did not know that the taxes were not being paid.

9. On January 9, 1991, the New York City Alcohol Beverage Control Board was advised of a proposed change wherein Mr. Cooper would have 10 shares of common stock in the Columbus Avenue Restaurant rather than the 20 shares which he had previously held. Under the proposed change, Mr. Cooper would continue as president. On March 28, 1991, the proposed change was approved. On November 2, 1993, a Notice of Approval of Corporate Change was filed with the State Liquor Authority whereby Rudyard Pagan would become president/secretary and treasurer/director of the Columbus Avenue Restaurant with 100 shares.

SUMMARY OF THE PARTIES' POSITIONS

10. At the hearing, petitioner maintained that he never made a cash investment in Columbus Avenue Restaurant. It is petitioner's understanding that he would only be compensated if the restaurant were a success and that he was responsible only on paper. Petitioner states that he was at the business from December 1989 until March or April 1991 and that his position was then assumed by Rudy Pagan. Petitioner insists that regardless of what the documents show, Mr. Pagan assumed control of the business sometime in 1991. Petitioner also states that he did not sign tax returns after he left.

11. The Division maintains that petitioner is a responsible officer of both the Columbus Avenue Restaurant and Cooper Café and that the tax and penalties should be sustained.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as "any officer, director or employee of a corporation . . . who as such officer, director or employee . . . is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]" (Tax Law § 1131[1]).

B. The determination that an individual is a responsible person depends upon the particular facts of each case (*Stacy v. State*, 82 Misc 2d 181, 183, 368 NYS2d 448, 451; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). The relevant factors to consider when determining whether a person has such a duty to act for the corporation include, *inter alia*, authorization to sign the corporate tax return, responsibility for management or maintenance of the corporate books, authorization to hire and fire employees and derivation of substantial income from the corporation or stock ownership (*see*, 20 NYCRR 526.11[b][2]; *Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Matter of Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, *appeal dismissed* 69 NYS2d 822, 513 NYS2d 1027).

C. In *Matter of Vogel v. Department of Taxation and Finance* (98 Misc 2d 222, 413 NYS2d 862), the court stated:

The general language of section 1131 (subd. 1), defining persons who are required to collect taxes, includes only those officers of a corporation who are 'under a duty to act for such corporation.' The resolution of whether an officer is under a duty to act, then, turns on a factual determination (citation omitted).

Indicia of this duty would include factors which directly relate to compliance with Article 28, such as the officer's day-to-day responsibilities and involvement, with the financial affairs and management of the corporation, his knowledge of such matters, the officer's duties and functions outlined in the certificate of incorporation and the bylaws, and the preparation and filing of sales tax forms and returns (*see*, *Chevlowe v. Koerner*, 95 Misc 2d 388, 391-392, 407 NYS2d 427, 429-430, *supra*). Furthermore, in situations involving closely held corporations, as in the present case, an officer's knowledge of the corporate affairs and his benefits received from corporate profits would be extremely important considerations.

The Division's regulations define a person under a duty to act on behalf of a corporation as

[g]enerally, a person who is authorized to sign a corporation's tax returns or who is responsible for maintaining the corporate books, or who is responsible for the corporation's management, is under a duty to act. (20 NYCRR 526.11[b][2].)

D. Since petitioner acknowledged that he was responsible for the sales and use taxes due from Cooper Café this issue is now moot and further discussion is unnecessary.

E. Petitioner's assertion that he had dissociated from the Columbus Avenue Restaurant in April 1991 can not be accepted. The record shows that, as president, petitioner signed a tax return on behalf of the Columbus Avenue Restaurant as late as January 30, 1992. Further, the Notice of Approval of Corporate Change, which approved making Rudyard Pagan the president of the corporation, was not filed until November 2, 1993. In view of the forgoing, it is concluded that petitioner's recollection of when he left the Columbus Avenue Restaurant is faulty and that he remained an officer throughout the periods in issue.

F. The weight of the evidence supports the conclusion that petitioner was a responsible officer of Columbus Avenue Restaurant. Petitioner held himself out as authorized to act for the Columbus Avenue Restaurant by applying for a liquor license and signing the certificate of registration and other documents which were filed with the Division. As president, petitioner had the authority to hire employees and co-sign checks, had access to the corporate books and was authorized to sign the firm's tax returns. The fact that, at one juncture, petitioner directed the firm's accountant to make sure that all of the sales were accounted for supports the conclusion that petitioner was authorized to act in this area. Although petitioner did not receive compensation from the corporation, he was clearly working in anticipation of receiving income. Under the circumstances, petitioner has not established that he did not have the authority to ensure that taxes would be paid. The fact that petitioner, as president failed to exercise his responsibility does not absolve him from liability. A corporate officer is not at liberty to disregard his duty and leave it to someone else to complete (*Matter of Blodnick v. State Tax Commn.*, *supra*; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d

890, 558 NYS2d 239; *accord, Capoccia v. State Tax Commn.*, 105 AD2d 528, 529, 481 NYS2d 476, 477).

G. The petition of Angus Cooper is denied and the notices of estimated determination dated August 2, 1993, as adjusted, and the notices of determination, dated November 1, 1993, are sustained together with such penalty and interest as are lawfully due.

DATED: Troy, New York
February 5, 2004

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE